Supreme Court, U.S.
FILED
MAY 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-5867 (7)

In the Supreme Court of the United States

OCTOBER TERM, 1989

SHIRLEY W. IRWIN, PETITIONER

v.

VETERANS ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT S. GREENSPAN
MICHAEL E. ROBINSON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

30 pp

QUESTIONS PRESENTED

1. Whether the time limit of 42 U.S.C. 2000e-16(c), which requires a government employee to file a Title VII employment discrimination suit in federal court within thirty days of receipt of notice of final administrative action on his complaint, is jurisdictional.

2. Whether receipt by the petitioner's attorney's office of notice of final action taken by the EEOC triggers the thirty-day period for filing a Title VII complaint against the federal government within the meaning of 42 U.S.C. 2000e-16(c).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	6
Argument:	
I. The thirty-day time limit for filing a federal employment discrimination complaint in district court under 42 U.S.C. 2000e-16(c) is jurisdictional	8
A. By its terms, the thirty-day limitation of Section 2000e-16(c) is a mandatory precondition to suit	8
B. There is no reason to ignore the plain terms of Section 2000e-16(c)	10
1. The thirty-day filing deadline for federal employee discrimination suits is not permissive	12
2. The legislative history of the Equal Opportunity Act of 1972 does not justify ignoring the plain terms of Section 2000e-16(c)	14
3. This Court's cases do not justify ignoring the plain terms of Section 2000e-16(c)	17
II. Petitioner received constructive notice of the EEOC decision when it was delivered to the offices of his designated counsel	20
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Baldwin County Welcome Center v. *Brown*, 466 U.S. 147 (1984)	9, 12
Bell v. *Brown*, 557 F.2d 849 (D.C. Cir. 1977)	21
Block v. *North Dakota*, 461 U.S. 273 (1983)	14

Cases—Continued: Page

Brown v. *GSA*, 425 U.S. 820 (1976) 14, 17
Brown v. *National Highway Traffic Safety Administration*, 673 F.2d 544 (D.C. Cir. 1982) 21
Chandler v. *Roudebush*, 425 U.S. 840 (1976) 10, 13
Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 8
Craig v. *Department of HEW*, 581 F.2d 189 (8th Cir. 1978) 20
Crown, Cork & Seal Co. v. *Parker*, 462 U.S. 345 (1983) 17
Decker v. *Anheuser-Busch*, 632 F.2d 1221 (1980), vacated and remanded, 670 F.2d 506 (5th Cir. 1982) 21, 22
Fair Assessment in Real Estate Ass'n v. *McNary*, 454 U.S. 100 (1981) 9
Gonzalez v. *Stanford Applied Engineering*, 597 F.2d 1298 (9th Cir. 1979) 21
Gwaltney of Smithfield v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) 8
Hallstrom v. *Tillamook County*, 110 S. Ct. 304 (1989) 8, 9, 12, 16
Hancock v. *Egger*, 848 F.2d 87 (6th Cir. 1988) 23
Harper v. *Burgess*, 701 F.2d 29 (4th Cir. 1983) 21
Heckler v. *Community Health Services*, 467 U.S. 51 (1984) 12
Honeycutt v. *Long*, 861 F.2d 1346 (5th Cir. 1988) 23
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 8
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 12
Jones v. *Madison Services Corp.*, 744 F.2d 1309 (7th Cir. 1984) 21
Josiah-Faeduwor v. *Communications Satellite Corp.*, 785 F.2d 344 (D.C. Cir. 1986) 21-22
Laird v. *Nelms*, 406 U.S. 797 (1972) 17
Lehman v. *Nakshian*, 453 U.S. 156 (1981) 17
Library of Congress v. *Shaw*, 478 U.S. 310 ..... 15, 17
Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 19
Love v. *Pullman*, 404 U.S. 522 (1972) 18
Martinez v. *Orr*, 738 F.2d 1107 (10th Cir. 1984) 19

Cases—Continued: Page

Milam v. *United States Postal Service*, 674 F.2d 860 (11th Cir. 1982) 19
Mohasco Corp. v. *Silver*, 447 U.S.C. 807 (1980) 9, 18
Rea v. *Middendorf*, 587 F.2d 4 (6th Cir. 1978) 21
Rice v. *Hamilton Air Force Base Commissary*, 720 F.2d 1082 (9th Cir. 1983) 10, 19
Ringgold v. *National Maintenance Corp.*, 796 F.2d 769 (5th Cir. 1986) 5, 22
Saltz v. *Lehman*, 672 F.2d 207 (D.C. Cir. 1982) 19
Schiavone v. *Fortune*, 477 U.S. 21 (1986) 23
Sims v. *Heckler*, 725 F.2d 1143 (7th Cir. 1984) 10, 19
Smith v. *Ayer*, 101 U.S. 320 (1879) 19
Soriano v. *United States*, 352 U.S. 270 (1957) 10, 14
Thomas v. *KATV Channel 7*, 692 F.2d 548 (8th Cir. 1982), cert. denied, 460 U.S. 1039 (1983) 22
TVA v. *Hill*, 437 U.S. 153 (1978) 20-21
United States v. *Locke*, 471 U.S. 84 (1985) 9, 20
United States v. *Mottaz*, 476 U.S. 835 (1986) 10, 14
United States v. *Testan*, 424 U.S. 392 (1975) 11
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 8
Zipes v. *Trans World Airlines*, 455 U.S. 385 (1982) 7, 13, 17, 18

Constitution, statutes, regulations and rules:

U.S. Const.:
Amend. I 3
Amend. V 3
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 3
29 U.S.C. 631 3-4
29 U.S.C. 633a 4
29 U.S.C. 791 *et seq.* 3
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*:
42 U.S.C. 2000e 3
42 U.S.C. 2000e-5 ..... 6, 13, 14
42 U.S.C. 2000e-5(b) 16
42 U.S.C. 2000e-5(c) 16
42 U.S.C. 2000e-5(e) 16, 18
42 U.S.C. 2000e-5(f)(1) 7, 16, 17, 18

Statutes, regulations and rules—Continued: Page

42 U.S.C. 2000e-16 ..... 6, 13, 15, 17
42 U.S.C. 2000e-16(c) (§ 717(c)) ..... *passim*
42 U.S.C. 2000e-16(d) 13
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 ..... 6, 14
5 U.S.C. 2301 4
5 U.S.C. 2302 4
5 U.S.C. 7703 21
28 U.S.C. 1346(b) 17
42 U.S.C. 405(g) 8
42 U.S.C. 1985 3
42 U.S.C. 1986 3
5 C.F.R. (1972):
Section 713.281(a) 21
Section 713.281(c) 21
29 C.F.R. 1613.214(a)(1)(i) 2
29 C.F.R. (1980):
Section 1613.281(a) 21
Section 1613.281(c) 21
Fed. R. Civ. P.:
Rule 5(b) 7, 20
Rule 15(c) 23

Miscellaneous:

136 Cong. Rec. S1020 (daily ed. Feb. 7, 1990) 16
H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971) 15
Note, *Equitable Tolling of Title VII Time Limits In Actions Against the Government*, 74 Cornell L. Rev. 199 (1988) 19
Note, *Limitations Periods Under Title VII: Has Time Run Out On The Sovereign Immunity Doctrine?*, 63 B.U.L. Rev. 1157 (1983) 15
S. 2104, 101st Cong., 2d Sess. (1990) 16
S. Rep. No. 415, 92d Cong., 2d Sess. (1971) 15

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-5867

SHIRLEY W. IRWIN, PETITIONER

v.

VETERANS ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-16; J.A. 33-43) is reported at 874 F.2d 1092. The opinion of the district court (J.A. 14-21) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17) was entered on June 13, 1989. A petition for rehearing was denied on July 13, 1989 (Pet. App. 18). The petition for a writ of certiorari was filed on October 10, 1989, and was granted on February 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 717(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), provides in pertinent part:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, * * * an employee or applicant for employment, if aggrieved by the final disposition of his complaint, * * * may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

STATEMENT

The Veterans Administration Medical Center in Waco, Texas, discharged petitioner Irwin on April 17, 1986. On June 12, 1986, he contacted an Equal Employment Opportunity Counselor complaining of discrimination on the basis of race, age and handicap, as well as retaliation for having previously sought redress for past acts of discrimination by the agency. When his complaint was not resolved to his satisfaction, petitioner filed a formal discrimination complaint with the Veterans Administration. The VA rejected his claim on the ground that he had failed to contact the counselor within thirty days of the alleged discrimination, as required by applicable regulations. See 29 C.F.R. 1613.214(a)(1)(i). Petitioner then appealed to the EEOC, which affirmed the VA's decision on March 19, 1987. J.A. 3-4. Notice of this decision was mailed to petitioner and his counsel on that date.[1] The mailing included the standard "Notice of Right To File A Civil Action." J.A. 4.[2]

Petitioner filed his original complaint in this action on May 6, 1987, alleging that the Veterans Administration discriminated against him because of his race, age, and handicap, in violation of 42 U.S.C. 2000e, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and the First and Fifth Amendments. J.A. 14.[3] The

---

[1] The notice to petitioner may have been delayed in the mail due to his apparent change of address. See J.A. 8.

[2] The right to sue notice specifically informed petitioner that "if you file a civil action, YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT. * * * Failure to provide the NAME OR OFFICIAL TITLE of the agency head or, where appropriate, the department head, may result in the loss of any judicial redress to which you may be entitled. (Please note: For this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education, and Welfare, *not* the local administrative department where you might work.) You must be sure that the proper defendant is named when you file your civil action." J.A. 5.

[3] In addition to the Veterans Administration, the complaint named Irvin Noll, Robert L. Cimber, and Charles Stenslie as individual defendants, alleging that they "acted in their individual capacities as well as supervisors for" the Veterans Administration, and conspired to deprive petitioner of the equal protection of the laws, or of equal privileges and immunities under the laws, in violation of 42 U.S.C. 1985 and 1986. J.A. 14; Compl. III, para. 9.

An amended complaint, filed July 28, 1987, added James Strong as a defendant, and included allegations of discrimination under the Age Discrimination in Employment Act of

government moved to dismiss, alleging, *inter alia*, that the district court lacked jurisdiction because the complaint was not filed within the time limit specified in 42 U.S.C. 2000e-16(c). J.A. 9, 17-18.

In response to the district court's request for proof of the date of receipt of notice of the EEOC decision (which included a statement of the right to sue, see J.A. 3-7), petitioner filed an affidavit asserting that he received notice of the EEOC decision by certified mail "on or about" April 7, 1987. J.A. 12-13. For their part, respondents filed a receipt showing that the EEOC decision and notice were delivered to the office of petitioner's attorney and accepted by an employee of the attorney on March 23, 1987. J.A. 18. After considering this evidence, the district court dismissed petitioner's complaint as untimely. J.A. 14-19.[4] In requesting reconsideration of that dismissal,

---

1967, 29 U.S.C. 631 and 633a, and of violations of the merit system principles in 5 U.S.C. 2301 and 2302. J.A. 14.

Despite the express warning contained in the right to sue notice (see note 2, *supra*), petitioner did not name the Administrator of the Veterans Administration, who was then Thomas K. Turnage, in either his original or his amended complaint. J.A. 14, 1. During the relevant time period, Irvin Noll was the Director of the Waco, Texas, VA Hospital. Robert Cimber was Chief, Rehabilitation Medicine Service, Charles Stenslie was Personnel Director, and James Strong was Vocational Rehabilitation Therapy Supervisor for the hospital.

[4] The court did not directly address the government's alternative contention that the complaint was defective because it failed to name the Administrator. See Gov't Amended Mot. to Dism. at 7-8 (filed Sept. 17, 1987). The court did state that "[b]ecause Plaintiff is suing the Veterans Administration, an official agency of the United States, jurisdiction under 42 U.S.C. § 2000e-16 is proper." J.A. 17. The failure to name the Administrator was not raised or briefed in the court of

petitioner's attorney filed an affidavit alleging that he was in Korea with his United States Army Reserve unit at that time, and did not actually learn of the decision until he returned to his office on April 10, 1987. J.A. 27-28. The district court denied reconsideration, observing that "[t]he thirty-day filing provision provided by 42 U.S.C. § 2000e-16 is jurisdictional in nature and subject to strict compliance. [Petitioner] has presented no evidence which would constitute an excuse from compliance with the thirty-day provision." J.A. 29.

The court of appeals affirmed. It relied on *Ringgold* v. *National Maintenance Corp.*, 796 F.2d 769, 770 (5th Cir. 1986), which held that, for purposes of Title VII actions against private employers, "the 90-period of limitation established by 42 U.S.C. § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue letter is delivered to the offices of formally designated counsel or to the claimant," even if counsel himself did not actually receive notice until later. The court found no reason to apply a different rule to suits alleging violations by federal employers. Accordingly, the court of appeals held that the petitioner received constructive notice of the EEOC final decision when the decision was received at the offices of his counsel by an employee authorized to receive it. Since it also concluded that "the thirty-day span allotted under § 2000e-16(c) operates as an absolute jurisdictional limit" (J.A. 36), the court of appeals determined that the district court lacked jurisdiction over petitioner's Title VII claim. J.A. 40.

---

appeals as an alternative ground supporting the district court decision, nor was it noted in our opposition to the certiorari petition.

SUMMARY OF ARGUMENT

Section 2000e-16(c) states in plain terms that an aggrieved federal employee may file a civil action "[w]ithin thirty days of receipt of notice of final action taken" by the employing agency or the EEOC. No provision is made for extending that time period; instead, the statutory language in terms specifies a mandatory pre-condition to suit. Statutory time limits on suits against the government delimit the sovereign's consent to be sued and, hence, define the courts' jurisdiction.

There is, in any event, no reason to read into the plain statutory language exceptions that it does not contain. Petitioner argues that the 90-day limit applicable to private sector suits is subject to equitable tolling, and that therefore the 30-day limit applicable to suits against the government should be as well. Suits against the sovereign, however, are not the same as suits against private parties.

The reference in Section 2000e-16 to Section 2000e-5 makes the relevant procedural provisions that are applicable in private sector suits applicable as well in the government context, but it does not indiscriminately incorporate all subsequent interpretations of those provisions, without regard to considerations of sovereign immunity. The general congressional intent in enacting the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, was to extend to federal employees the rights guaranteed to private sector employees in Title VII. As this Court recognized in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), that general intent does not constitute a broad waiver of sovereign immunity incorporating all the unspecified details of the private Title VII remedy into the remedies provided federal

employees. It would be inappropriate to find an overarching intent to treat private sector and government suits the same—particularly with respect to time limits—since Congress itself differentiated between private and governmental employees by providing the latter with a significantly shorter time limitation. Compare 42 U.S.C. 2000e-5(f)(1) (90 days) with 42 U.S.C. 2000e-16(c) (30 days).

Title VII, like other statutes placing the United States in the same position as a private party, must be interpreted consistently with principles of sovereign immunity. Accordingly, cases interpreting time limits in Title VII provisions applicable in the private sector should not automatically be applied to time limits that define the sovereign's consent to suit. In any event, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982)—the private sector case upon which petitioner and amicus National Treasury Employees Union chiefly rely—is based on policy concerns that are inapplicable to time limits governing the judicial review of claims by federal employees.

The thirty-day time limit was triggered here when notice of the EEOC decision and the right to sue were delivered to the offices of petitioner's designated counsel. Congress enacted Section 2000e-16(c) in the context of our familiar system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent, and notice to the attorney constitutes notice to his client. See Fed. R. Civ. P. 5(b). Because it is important that triggering events be easily and objectively determinable, it would be particularly undesirable to adopt a rule that the time limitation does not start to run until the attorney or client actually reads the right to sue notice.

ARGUMENT

I. THE THIRTY-DAY TIME LIMIT FOR FILING A FEDERAL EMPLOYMENT DISCRIMINATION COMPLAINT IN DISTRICT COURT UNDER 42 U.S.C. 2000e-16(c) IS JURISDICTIONAL

A. By Its Terms, The Thirty-Day Limitation Of Section 2000e-16(c) Is A Mandatory Precondition To Suit

Petitioner's suit is barred by the plain terms of Section 2000e-16(c). As with any statute, the starting point for interpreting 42 U.S.C. 2000e-16(c) is the language of the statute itself. *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1989); *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 2000e-16(c) provides that a federal employee claiming discrimination against the government under Title VII may obtain judicial review of his claim by filing a complaint in district court "[w]ithin thirty days of receipt of notice of final action taken by * * * the Equal Employment Opportunity Commission upon an appeal from a decision or order of [the appropriate] department, agency, or unit." The statute offers no alternative means of obtaining judicial review, and does not suggest that the time limit may be tolled on the basis of equitable factors.[5] Therefore, the filing of a com-

[5] Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 763-764 (1975) (construing 42 U.S.C. 405(g) to be a statute of limitations subject to waiver and equitable tolling because it provides that after a hearing before the Secretary, any individual "may obtain review of [the Secretary's] decision by a civil action commenced within sixty days after the mailing to him of notice of such decision *or within such further time as the Secretary may allow*" (emphasis added)). The absence of any provision in Section 2000e-16(c) for equitable modification of the filing deadline strongly suggests that Congress intended the traditional sovereign immunity rules to apply.

plaint in district court within the thirty-day limitation is a mandatory, not an optional, precondition to suit. Cf. *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 309 (Court is "not at liberty to create an exception [to mandatory precondition to suit] where Congress has declined to do so"). Compliance with the thirty-day limit is thus a "jurisdictional prerequisite" for judicial review of federal employment discrimination claims. See *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 137 (1981) (Brennan, J., concurring in judgment) (noting that when the exhaustion of state remedies is a mandatory precondition to suit, it is "in that sense a 'jurisdictional prerequisite' ").

This Court, moreover, repeatedly has stressed that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980). See also *United States* v. *Locke*, 471 U.S. 84, 101 (1985) ("if the concept of a filing deadline is to have any content, the deadline must be enforced"); *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984) ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants."). Thus, "[a]s a general rule, if an action is barred by the terms of a statute, it must be dismissed," *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 311, even if the plaintiff is a Title VII complainant. *Ibid.*, citing *Baldwin County Welcome Center* v. *Brown*, *supra*.

Faithful adherence to statutory time limitations is particularly crucial in suits against the government. Time limitations specified by Congress are conditions of the sovereign's consent to suit. As such, they define the extent of the court's jurisdiction and, accordingly, must be strictly observed. *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). See *Sims* v. *Heckler*, 725 F.2d 1143, 1145-1146 (7th Cir. 1984); *Rice* v. *Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1083 (9th Cir. 1983).

B. There Is No Reason To Ignore The Plain Terms Of Section 2000e-16(c)

Neither petitioner nor amicus curiae National Treasury Employees Union (NTEU) contends that the language of Section 2000e-16(c) is itself ambiguous with regard to the filing deadline. Rather, they contend instead that this provision should be "liberally" construed in light of its remedial purpose, and that compliance with the statutory time period for filing a complaint mandated by Section 2000e-16(c) should not be deemed a "jurisdictional" prerequisite to suit, but rather should be treated like a statute of limitations subject to waiver, estoppel, and equitable tolling. Pet. Br. 5, 9-11; NTEU Br. 8-10; but see NTEU Br. 16 ("'the plain, obvious and rational meaning of a statute is always to be preferred,' even where suit is being brought against the government" (quoting *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976)).

Petitioner and NTEU offer somewhat inconsistent arguments in support of their invitation to this Court to overlook the plain statutory language of Section 2000e-16(c). For example, NTEU suggests that the statutory limitation need not be strictly observed because the thirty-day filing requirement "is not mandatory in tone nor does it speak in jurisdictional terms." NTEU also claims that the language, structure and legislative history of the provision suggest that Congress intended the thirty-day time period to be interpreted in the same manner as the private sector limit (NTEU Br. 12-15); and that "sovereign immunity provides no support for construing the public sector provision differently from a virtually identical provision in the private-sector law." *Id.* at 15-18.

Petitioner's argument, however, proceeds on the premise that "neither the statute nor the legislative history provides much in the way of guidance." Pet. Br. 9. He argues that this asserted lack of guidance creates a "procedural ambiguity" that should be resolved in favor of the complaining party, and that the filing deadline in Section 2000e-16(c) should be treated like the filing deadline for private sector employees. Pet. Br. 10.[6] None of these arguments offers any sufficient reason for disregarding the plain language of Section 2000e-16(c) in this case.[7]

---

[6] For the reasons explained above, we do not agree that there is any "lack of guidance" in the statutory language. Moreover, even if there is any ambiguity in that language, principles of sovereign immunity require that the terms of the government's consent to be sued be interpreted strictly, with ambiguities resolved in favor of the government. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976).

[7] We note, however, that this Court need not reach the jurisdictional issue. While petitioner and NTEU argue vigorously that 42 U.S.C. 2000e-16(c) is not jurisdictional but is subject to waiver, estoppel and equitable tolling, neither has shown that petitioner would be entitled to equitable relief under the facts of this case, even if this Court should agree with their interpretation of the statute. First, the government filed a

1. *The Thirty-Day Filing Deadline For Federal Employee Discrimination Suits Is Not Permissive*

NTEU contends (Br. 10-11) that Section 2000e-16(c) does not impose a mandatory time limitation because it is phrased in permissive terms and refers to

---

timely motion to dismiss for non-compliance with the statutory deadline (see J.A. 9-10), so the government has clearly not waived petitioner's non-compliance with the limitation period. Nor is there any basis for a claim that affirmative misconduct on the part of the defendant lulled the petitioner into inaction, see *Heckler* v. *Community Health Services*, 467 U.S. 51, 59 (1984), even assuming that such misconduct could form a basis for an estoppel against the government. See generally U.S. Br. in *Office of Personnel Management* v. *Richmond*, No. 89-1943 (argued Feb. 21, 1990). Finally, there is no basis for any claim that petitioner received inadequate notice or acted diligently, but unsuccessfully, to file a timely complaint. Petitioner and his attorney both received actual notice weeks before the thirty-day filing period expired. Petitioner's attorney should have been aware that the notice had been received by his office on March 23, and that there was at least a substantial possibility that the filing period ran from that date. Nevertheless, suit was not filed until the timeliness of the complaint was in doubt. See *Baldwin County Welcome Center* v. *Brown*, 466 U.S. at 151 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975) (the equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioner's "failure to take the minimal steps necessary" to preserve his claims).

As this Court has held, where none of petitioner's arguments requires the Court to disregard the plain language of a statutory requirement for filing suit, the Court "need not determine whether [the procedural requirement] is jurisdictional in the strict sense of the term." *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 311.

the provisions applicable to private sector employees —*i.e.* it states that "[w]ithin thirty days of receipt of notice of final [agency] action * * * [an employee] *may* file a civil action as provided in section 2000e-5 of this title" (emphasis added). But it is clear that the permissive form is used simply to indicate that an aggrieved claimant, if he desires, may seek review of his discrimination claim in federal court, although he is obviously not obligated to do so. There is no suggestion that the time limitation itself is permissive. The statute cannot reasonably be read to provide that an employee may file an action within 30 days, or such longer time as he prefers.

Nor does Section 2000e-16's reference to Section 2000e-5—which contains procedures for challenging employment discrimination in the private sector—suggest that the time limit in Section 2000e-16 is permissive. Instead, by that reference, Congress simply incorporated the express procedural provisions spelled out in the former Section into the latter. See also 42 U.S.C. 2000e-16(d) ("[t]he provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder").[8] There is nothing in Section 2000e-5 that states that the time limits for filing civil actions against private sector employers in district courts are not jurisdictional, and they may well be.[9]

---

[8] Thus, this Court held in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976) that the procedural provision of a trial *de novo* in district court contained in Section 2000e-5 also applied to federal employees under Section 2000e-16.

[9] As we explain at pp. 17-19, *infra*, this Court's decision in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), dealt with a quite different question: whether the timely filing of the complaint *at the administrative level* is a jurisdictional prerequisite to a subsequent judicial complaint.

In any event, the reference to Section 2000e-5 in Section 2000e-16(c) should not be interpreted as indiscriminately incorporating all subsequent interpretations of the former Section into the latter, since Section 2000e-16(c) must be construed in light of well-settled principles of sovereign immunity. See *Brown* v. *GSA*, 425 U.S. 820, 833 (1976) (Title VII remedies against the government, which constitute consent to be sued, necessarily implicate issues of Governmental immunity). "In particular, '[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity.'" *United States* v. *Mottaz*, 476 U.S. at 841 (quoting *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983)). Thus, because the thirty-day limitations period set forth in Section 2000e-16(c) "is a central condition of the consent given by the Act," see *Mottaz*, 476 U.S. at 843, courts may not extend that period by terming it a statute of limitations and on that basis applying equitable principles that, in the private context, might justify the waiver or tolling of statutes of limitations. See *Soriano* v. *United States*, 352 U.S. at 275 (petitioner's reliance on case holding that the existence of hostilities tolled statute of limitations was misplaced because case "involved private citizens, not the Government [and, hence,] ha[d] no applicability to claims against the sovereign").

2. The Legislative History Of The Equal Employment Opportunity Act Of 1972 Does Not Justify Ignoring The Plain Terms Of Section 2000e-16(c)

In 1972, Congress enacted the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. In that Act, it extended the protection of Title VII to federal employees in order to provide such

employees with "the full rights available in the courts as are granted to individuals in the private sector under Title VII." S. Rep. No. 415, 92d Cong., 2d Sess. 16 (1971); accord H.R. Rep. No. 238, 92d Cong., 1st Sess. 21 (1971). Petitioner (Br. 9-10) and NTEU (Br. 12-16) contend that this purpose demonstrates that Congress intended to enact a broad waiver of sovereign immunity, and that since the filing deadline for private employees is subject to equitable tolling, the filing deadline applicable to federal employees must also be. Neither contention is correct. In *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), this Court expressly refused to interpret the 1972 Act as a broad waiver of sovereign immunity that required federal employees to be treated precisely like private employees under Title VII. Compare 478 U.S. at 319 (majority opinion, recognizing that Congress waived sovereign immunity by extending Title VII to federal employees in 1972 Act, but refusing to read that waiver broadly to include liability for interest on attorney fee awards) with *id.* at 325-326 (dissenting opinion, urging interpretation of 1972 Act as broad waiver of sovereign immunity—the precise position now urged by petitioner and NTEU).

The structure of 42 U.S.C. 2000e-16 demonstrates that although Congress intended to extend to federal employees protections against employment discrimination equivalent to those previously afforded private sector employees, it recognized the differences in the situations of the two groups by providing somewhat different procedural mechanisms for enforcing those protections. See Note, *Limitations Periods Under Title VII: Has Time Run Out On The Sovereign Immunity Doctrine?*, 63 B.U.L. Rev. 1157, 1183 (1983). For example, federal employees have the op-

tion of appealing an adverse agency action to the EEOC or proceeding directly to the district court (42 U.S.C. 2000e-16(c))—an option not available to a private sector employee, who must proceed through the EEOC or the appropriate state agency. 42 U.S.C. 2000e-5(b), (c) and (e). And, of particular significance to this case, Congress enacted a significantly shorter time period for federal employees to file complaints in district court than it did for private sector employees. Compare 42 U.S.C. 2000e-5(f)(1) (90-day period for private sector employees) with 42 U.S.C. 2000e-16(c) (30-day period for federal employees).[10] This difference in treatment with regard to the precise time limit in question conclusively refutes the claim that Congress intended to treat federal and private employees identically under Title VII.[11]

But even assuming Congress intended that federal and private sector employees should be treated alike,

---

[10] Alternatively, a federal employee may file a civil suit if either the employing agency or the EEOC has not acted on his claim within 180 days after the initial charge was filed with it. 42 U.S.C. 2000e-16(c).

[11] Amicus NTEU suggests that the statutory time limit for federal employees is too short (Br. 14, noting that "30 days is a difficult deadline for even the most diligent employee to meet"). This concern is more appropriately addressed to Congress, which established the deadline, rather than this Court. Cf. *Hallstrom* v. *Tillamook County*, 110 S. Ct. at 309. Indeed, Congress is presently considering S. 2104, 101st Cong., 2d Sess. (1990), which includes a provision that would amend Section 2000e-16(c) to increase the time limit for federal employee suits to 90 days from the receipt of the right to sue notice. 136 Cong. Rec. S1020 (daily ed. Feb. 7, 1990). It is not for this Court to rewrite the statute in the guise of "accommodations * * * in construing the statutory time limit." NTEU Br. 15.

that general intent is not enough to constitute a waiver of sovereign immunity justifying equitable limitations on the express statutory preconditions to the filing of a civil action against a federal employer. This Court has specifically held that the analysis of Title VII in the context of private employment might not be applicable to the government employment context precisely because "there [are] no problems of sovereign immunity in the context of [private employment]." *Brown* v. *GSA*, 425 U.S. at 833. And, as the Court explained in *Library of Congress* v. *Shaw*, 478 U.S. at 319-320, not only Title VII but "[o]ther statutes placing the United States in the same position as a private party also have been read narrowly to preserve certain immunities that the United States has enjoyed historically." The Court cited *Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (jury trials are available to private, but not to Government, employees under the Age Discrimination in Employment Act), and *Laird* v. *Nelms*, 406 U.S. 797 (1972) (although the Federal Tort Claims Act made the United States liable for the "negligent or wrongful act or omission of any employee of the Government * * * if a private person, would be liable to the claimant," 28 U.S.C. 1346(b), the United States nonetheless is not liable for the entire range of conduct classified as tortious under state law).

3. *This Court's Cases Do Not Justify Ignoring The Plain Terms Of Section 2000e-16(c)*

Petitioner (Br. 6-11) and NTEU (Br. 8-9) rely on several decisions of this Court interpreting filing requirements in cases arising in the private sector, urging that the Court's conclusion that such requirements are subject to equitable tolling should also apply to the filing requirement in Section 2000e-16 for

suits by federal employees. As we have explained, however, the doctrine of sovereign immunity precludes such an automatic application of precedent from the private sector to suits against the government. See pp. 13-14, *supra*.

In addition, it is significant that the seminal case involving Title VII time limits in the private sector, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), involved the interpretation of 42 U.S.C. 2000e-5(e)—the statutory time limit for filing the initial charge with the EEOC—not 42 U.S.C. 2000e-5(f)(1)—the time limit governing the subsequent judicial action.[12] The Court observed in *Zipes* that strict time limits are inappropriate "in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." 455 U.S. at 397 (quoting *Love* v. *Pullman*, 404 U.S. 522, 527 (1972)). But the filing limit for the judicial complaint comes into play at a much later stage in the proceedings, after administrative review of the case

[12] We recognize that in *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 349 n.3 (1983), a case involving the timeliness of a Title VII complaint by a private sector employee, the Court stated that the employer's argument that the Section 2000e-5(f)(1) time limit was jurisdictional "is foreclosed by the Court's decisions in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982), and *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 811 and n.9 (1980)." The *Mohasco* citation refers to a footnote in that case noting that the employer had not asserted a claimant's failure to file a complaint within 90 days as a defense. As the Court explained in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. at 398, that failure would have been irrelevant if the defect were jurisdictional. Nevertheless, this Court has not expressly considered the factors that distinguish a time limit applicable to the initial filing of the charge with the EEOC from those that apply to the filing of the judicial complaint.

has been completed. It is not unreasonable to expect that the aggrieved employee will either have retained counsel by that point in the process or will promptly do so in order to pursue his judicial remedies. Moreover, because the time period is triggered by receipt of the notice of the right to sue, there is no uncertainty about the claimant's knowledge of his legal remedies, as there may be in the context of the initial filing of the complaint. Accordingly, the policy concern informing *Zipes* is inapplicable with respect to the time limits for judicial review. Cf. Note, *Equitable Tolling Of Title VII Time Limits In Actions Against The Government*, 74 Cornell L. Rev. 199, 212-215 (1988) (suggesting that time limits after first interagency filing should be jurisdictional, as at that point "concerns with coercion within the workplace should disappear").

In sum, because the statutory deadline in Section 2000e-16(c) constitutes one of the terms of the sovereign's consent to be sued and, as such, defines the district court's jurisdiction, the court below correctly concluded that the timely filing requirement in Section 2000e-16(c) is a jurisdictional prerequisite to district court consideration of a government employee's Title VII complaint. Accord *Sims* v. *Heckler*, 725 F.2d 1143, 1145-1146 (7th Cir. 1984); *Rice* v. *Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1083 (9th Cir. 1983); Contra *Martinez* v. *Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984); *Milam* v. *United States Postal Service*, 674 F.2d 860, 862 (11th Cir. 1982); *Saltz* v. *Lehman*, 672 F.2d 207, 208 (D.C. Cir. 1982).

II. PETITIONER RECEIVED CONSTRUCTIVE NOTICE OF THE EEOC DECISION WHEN IT WAS DELIVERED TO THE OFFICES OF HIS DESIGNATED COUNSEL

The court below correctly decided that petitioner received constructive notice of the EEOC decision when the decision was delivered to the offices of his designated counsel. As this Court has observed, we operate under a "system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1879)).

This basic assumption underlying our legal system is reflected in Fed. R. Civ. P. 5(b), which requires that "[w]henever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court." [13]

When Congress enacted Section 2000e-16(c), it was of course aware of this assumption; nevertheless, the only exception it made to the usual rules of service was a provision that the relevant time period starts with receipt, rather than mailing, of the notice. Compare Fed. R. Civ. P. 5(b) with 42 U.S.C. 2000e-16(c). No further exceptions should be added by judicial interpretation. *TVA* v. *Hill*, 437 U.S. 153, 194-196 (1978); *United States* v. *Locke*, 471

[13] Rule 5(b) further provides that service upon the attorney may be made by mailing a copy of the document to the attorney's last known address. That is precisely the course followed by the EEOC here.

U.S. at 95-96. Instead, in the absence of any indication that Congress intended to deviate from the long-standing tradition of representative litigation, the statutory language should be interpreted in light of that tradition. See *Decker* v. *Anheuser-Busch*, 632 F.2d 1221, 1224 (1980), vacated and remanded for additional factfindings, 670 F.2d 506 (5th Cir. 1982) (en banc).[14]

[14] The circuits that have addressed the issue have generally recognized that the receipt of the EEOC notice of right to sue by a claimant's attorney triggers the statutory period for filing suit. See *Jones* v. *Madison Services Corp.*, 744 F.2d 1309, 1313-1314 (7th Cir. 1984); *Harper* v. *Burgess*, 701 F.2d 29, 30 (4th Cir. 1983); *Gonzalez* v. *Stanford Applied Engineering*, 597 F.2d 1298, 1299 (9th Cir. 1979). Cf. *Rea* v. *Middendorf*, 587 F.2d 4 (6th Cir. 1978) (when claimant receives notice *before* attorney, time runs from claimant's receipt of notice).

Two circuits have held that the statutory time limit does not begin to run until the claimant himself receives notice. *Bell* v. *Brown*, 557 F.2d 849 (D.C. Cir. 1977); *Craig* v. *Department of HEW*, 581 F.2d 189, 193 (8th Cir. 1978). As the court below explained (J.A. 37-40), those cases were decided when regulatory authority under Title VII was vested in the former Civil Service Commission, whose regulations specifically stated that the employee could file a civil action "[within] thirty (30) calendar days of *his* receipt of notice of final [agency or Commission] action." 5 C.F.R. 713.281(a) and (c) (1972) (emphasis added). Since then, regulatory authority has been shifted to the EEOC, which modified this regulation by dropping the word "his" prior to the word "receipt." 29 C.F.R. 1613.281(a) and (c) (1980). As the court below observed (J.A. 40), with this change in the regulation, and "[w]ithout an authoritative administrative interpretation of the statute, much of the rationale for [those cases] disappears." We note, however, that the D.C. Circuit has subsequently followed *Bell* without further analysis in *Brown* v. *National Highway Traffic Safety Administration*, 673 F.2d 544 (1982) (interpreting time limits under 5 U.S.C. 7703), but see *Josiah-Faeduwor* v. *Communications Satellite*

Finally, the conclusion of the court below that such notice is effective from the time of its delivery to the attorney's office—without regard to when the attorney actually reads the communication—is both reasonable and fully consistent with the purposes of Title VII. See *Ringgold* v. *National Maintenance Corp.*, 796 F.2d at 770; *Decker* v. *Anheuser-Busch*, 632 F.2d at 1224. It is important that the event triggering the running of the statutory time limitation be easily and objectively determinable by both parties to the litigation. The receipt by counsel's office of a certified letter is such an event, since it is memorialized by a signed acknowledgment of receipt. See J.A. 18. In contrast, the date on which counsel first actually reads the notice is not so easily verifiable. Cf. *Reed* v. *Frank*, petition for cert. pending, No. 89-6585 (EEOC notice delivered to counsel's office on June 22, 1987, but allegedly not read by counsel until either June 23 or 24, 1987). Commencement of the statutory time period should not hinge on the internal office procedures or work habits of particular attorneys. The handling of the EEOC right to sue notice, once received at the offices of the claimant's counsel of record, is a matter between the claimant and his counsel. It should not affect the limitation on suit mandated by Congress.

In this case, the statutory time period began to run when the right to sue notice was received at the office of petitioner's attorney on March 23, 1987--not the later date when it was received by petitioner himself,

---

Corp., 785 F.2d 344, 347 (D.C. Cir. 1986) (refusing to follow "bright line" test of *Bell* in private sector case, where claimant failed to receive notice because she moved without notifying EEOC of her new address). See also *Thomas* v. *KATV Channel 7*, 692 F.2d 548 (8th Cir. 1982) (following *Bell* in private sector case), cert. denied, 460 U.S. 1039 (1983).

or the still later date when petitioner's attorney actually read the notice. Since suit was not filed within 30 days of March 23, petitioner's Title VII action was jurisdictionally out of time.[15]

---

[15] Petitioner asserts (Br. 11-20) that the event that triggers the running of the statutory time period is the receipt of actual notice by petitioner, and that notice to his attorney is not sufficient. Even if the time did not start to run until April 7, when petitioner allegedly received the right to sue notice, peitioner's complaint was still untimely, because he failed to name the proper defendant in his complaint and did not cure this defect through notice to the proper defendant within the pertinent time period.

Section 2000e-16(c) expressly requires that in the civil action authorized by that Section, "the head of the department, agency, or unit, as appropriate shall be the defendant." This requirement was highlighted in the notice of right to sue received by petitioner and his attorney. See note 2, *supra*. Despite this clear warning, petitioner nevertheless failed to name the Administrator of the Veterans Administration. Instead, he named in his complaint and in his amended complaint only the Veterans Administration and certain VA employees. See note 3, *supra*. This was jurisdictionally inadequate. See, *e.g.*, *Hancock* v. *Egger*, 848 F.2d 87 (6th Cir. 1988); *Honeycutt* v. *Long*, 861 F.2d 1346, 1350-1351 (5th Cir. 1988). Even amicus NTEU recognizes that naming the head of the agency is an "absolute requirement." NTEU Br. 14 n.13.

While petitioner could even today amend his complaint to add the Administrator of the VA as a named defendant, that would not cure the jurisdictional problem. Under Fed. R. Civ. P. 15(c), an amendment changing a party against whom a claim is asserted "relates back" to the date the original complaint was filed only if a plaintiff has given adequate notice to the proper defendant within the applicable time period. *Schiavone* v. *Fortune*, 477 U.S. 21, 29 (1986). Petitioner has apparently failed to satisfy that requirement. Service of the complaint was made on the named defendants on May 11 and 12, 1987. Docket Entries 2-4. Even assuming that the time did not begin to run until April 7, the VA

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT S. GREENSPAN
MICHAEL E. ROBINSON
Attorneys

MAY 1990

---

thus did not receive constructive notice of the action until 34 days later. Therefore, the Administrator of the Veterans Administration received neither actual nor constructive notice of the action within the prescribed period.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 903